IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	
HOUSTON REGIONAL SPORTS NETWORK, L.P.	)	Chapter 11 Case No. 4:13-bk-35998
Debtor.	)	
HOUSTON ASTROS, LLC, et al.,	)	
Appellants,	)	
-against-	)	Case No. 4:14-cv-304
HOUSTON REGIONAL SPORTS NETWORK, L.P., et al.,	)	
Appellees.	)	

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INTRODUCTION

The briefs filed by Comcast and the Rockets are an exercise in obfuscation. The core issue in this appeal is whether the Bankruptcy Code preempts state law and forces the Network and its affiliates to accept fiduciary duties they validly disclaimed under Delaware law. But Comcast and the Rockets attempt to completely avoid that issue, arguing that it is not actually presented, that the court need not decide it, and that the opinion below does not even discuss preemption. That is exactly the problem. Relying on general principles articulated in cases that did not involve the fiduciary-duty disclaimer here, the bankruptcy court preempted Delaware law without engaging in any preemption analysis at all. Its reasoning conflicts with bedrock principles of preemption doctrine that the Supreme Court and the Fifth Circuit have consistently applied in bankruptcy and non-bankruptcy cases alike. The reasoning does not become any more persuasive when Comcast and the Rockets simply parrot it back in their briefs.

Even if the Court could impose fiduciary duties here, however, that would still lead to the unavoidable conclusion that this involuntary petition is futile. Imposing fiduciary duties on the Astros-appointed director fundamentally changes the structure of the Network and triggers the Astros' termination rights under the Media Rights Agreement. Comcast and the Rockets barely contest this reality, and for good reason. The bankruptcy court imposed fiduciary duties precisely because it would force a fundamental change in the governance of the Network. Instead, Comcast and the Rockets attempt to once again obscure the issue by disputing whether Delaware courts really meant what they said when announcing a fundamental change in corporate governance is a *de facto* assignment. They did, as shown by the multiple Delaware cases analyzing whether a governance change amounted to an assignment.

And all paths to reorganization that do not involve improperly imposed fiduciary duties are equally destined to fail. The bankruptcy court suggested it agrees—which is why it had to

resort to the novel argument that it could forcibly impose disclaimed fiduciary duties—and in arguing otherwise, Comcast and the Rockets are fighting against the conclusion of the bankruptcy court in the orders those two are supposedly defending. Because the Media Rights Agreement is a trademark license and a personal services contract protected by 11 U.S.C. §§ 365(c)(1) and (e)(2), the operation of the Network by a trustee or a sale of the Network's assets would inevitably result in termination of the Media Rights Agreement. The Astros wish a different result were possible, and would vote for a profitable plan that preserved their ability to protect their highly personable and valuable media rights, but none exists. That is proven by the undisputed evidence that no one has uncovered a profitable path forward in the past two years.

As to bad faith—a completely separate and independent basis for dismissing this involuntary petition—Comcast does not quibble with two dispositive facts. Comcast colluded with four of its affiliates to file an involuntary petition, and Comcast did so because Comcast itself was precluded from filing an involuntary petition under the terms of the Network's governing documents. It did so to facilitate a restructuring that would repay Comcast's $100 million secured loan and could include Comcast acquiring the Network and its equity upside at a significant discount to its true value. Comcast and the Rockets cannot paper over that bad faith by pointing to the subsequent joinder by the Rockets and the Network's landlord. The relevant time for determining good faith is when the petition is initially filed.

All of this explains why Comcast and the Rockets want to avoid the merits and have this Court decide the case on jurisdictional grounds instead. But there is no basis for doing so. The decision to commence rather than dismiss an *involuntary bankruptcy petition* is a final order, especially where that decision depends on the imposition of otherwise validly disclaimed fiduciary duties that are intended to affect the administration and disposition of the Network's

bankruptcy estate. Comcast and the Rockets do not cite a single case holding otherwise, but instead cite inapt precedent addressing whether a motion to dismiss a *voluntary petition* is immediately appealable. Motions to dismiss a voluntary and an involuntary case are significantly different; the former allows an already ongoing case to continue; the latter allows a case that has not yet commenced to start.

But even if the bankruptcy court's orders were not final, this Court should exercise its discretion to review those orders on an interlocutory basis. The question whether a bankruptcy court can force an involuntary debtor and its affiliates to exercise fiduciary duties that they do not want and that they validly disclaimed pre-petition based on an inchoate preemption theory is an important and novel question. So is the question whether post-petition joinders in the petition can cure Comcast's bad faith, an issue on which there is a difference of opinion amongst the federal courts. Comcast and the Rockets respond primarily by arguing review is unnecessary because they will win on the merits. That is not only wrong, it simply begs the question.

Despite the arguments presented in the opposition briefs, the involuntary petition should be dismissed as a matter of law.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE DISTRICT COURT'S UNPRECEDENTED AND IMPORTANT ORDERS

Because the appealed orders impose fiduciary duties that will affect the administration and disposition of the Network's assets and conclude the portion of the case that determines whether the Network can properly be involuntarily thrust into bankruptcy at all, those orders are final under the "practical, less technical" approach that applies in bankruptcy cases. *In re Kizzee-Jordan*, 626 F.3d 239, 242 (5th Cir. 2010). Comcast and the Rockets claim otherwise by citing cases that have held the denial of a motion to dismiss *a voluntary petition* is not

immediately appealable. *See* March 6, 2014 Brief for the Comcast Appellees [Dkt. 45] at 4; March 6, 2014 Brief of the Rockets-Appellees [Dkt. 43] at 5-7.[1] But this appeal involves an *involuntary* petition. The effect of denying a motion to dismiss a voluntary and an involuntary petition are significantly different. Denying a motion to dismiss a voluntary petition merely allows a bankruptcy case that is already moving forward to continue. Denying a motion to dismiss an involuntary petition (and simultaneously granting an order for relief) requires that the case begin. The bankruptcy court here, for example, did not consider first-day motions, require the Network to have counsel, or do any of the tasks that normally commence a bankruptcy case until *after* ruling on the motion to dismiss. Denying an involuntary petition thus "ends a discrete judicial unit in the larger case," *In re Heard Family Trucking, Inc.*, 41 F.3d 1027, 1029 (5th Cir. 1995), in a way denying a voluntary petition does not.

It is no response that the cases cited by Comcast and the Rockets were purportedly "categorical" that motions to dismiss are not appealable. Comcast Br. at 4. The cases are categorical because they considered only the appealability of the issue before them—commencement of voluntary petitions—so they had no reason to consider whether involuntary petitions might be different in kind and require a different rule. Courts often hold that seemingly categorical statements in prior opinions have to be viewed in context, particularly as they relate to jurisdictional issues. *See, e.g.*, *Indiana v. Edwards*, 554 U.S. 164, 169-73 (2008).

Comcast's other arguments against finality are no more persuasive. It ignores reality to say that imposing previously disclaimed fiduciary duties on the Astros-appointed director and the other directors of the Network's General Partner will not affect the administration and

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[1] That is true even of *In re Phillips*, 844 F.2d 230 (5th Cir. 1988), a case the Rockets mistakenly claim involved an involuntary petition. *Id.* at 231 (noting that the appeal involved a "motion to dismiss the petition of the debtor, Patsy D. Phillips" and that "Phillips filed a *voluntary* petition for relief"). Emphasis added unless otherwise noted.

disposition of estate assets. *See* Comcast Br. at 4-5. The point of imposing previously disclaimed fiduciary duties is precisely so as to change how the directors will operate the Network going forward—from whether and on what terms to request DIP financing to whether to approve a proposed plan. *See* Feb. 12, 2014 Mem. Opp. [Bankr. Dkt. 238] at 20. Comcast also cannot avoid the differences between voluntary and involuntary petitions by claiming a discrete judicial unit is synonymous with an adversary proceeding for purposes of finality. *See* Comcast Br. at 5. That rule does not match the Fifth Circuit's actual practice, and the quote in *In re Heard* from which Comcast derives this supposed rule has not been echoed in any subsequent Fifth Circuit decisions. *See, e.g.*, *In re Chunn*, 106 F.3d 1239, 1241 (5th Cir. 1997) (holding orders granting relief from an automatic stay are immediately appealable because they resolve a discrete judicial unit in the larger case); *In re Eagle Bus Mfg., Inc.*, 62 F.3d 730, 733-34 (5th Cir. 1995) (same for motions to file untimely proofs of claim); *In re Kitty Hawk, Inc.*, 204 F. App'x 341, 343-33 (5th Cir. 2006) (same for motions denying administrative expense claims). Indeed, if the Fifth Circuit wanted such a narrow rule, it would simply say "disposes of an adversary proceeding," rather than "a discrete judicial unit."

Even if the appealed orders are not final, this Court has discretion to review them on an interlocutory basis. *See* 28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8003. None of the reasons for declining to do so offered by Comcast and the Rockets can withstand scrutiny. *First*, whether a bankruptcy court can force a debtor-in-possession and its affiliates to carry out fiduciary duties previously and validly disclaimed is a pure issue of law—and one that controls the outcome of this appeal. *See Smith v. AET, Ltd.*, 2007 WL 1644060, at *5 (S.D. Tex. June 4, 2007) (holding the test for interlocutory review is whether there is "a controlling issue of law … where there is substantial ground for difference of opinion"). Although the Rockets argue the bankruptcy

court's decision "was highly fact driven," Rockets Br. at 8, the opinion itself makes clear *all* of the bankruptcy court's analysis regarding futility ultimately rested on the assumption that the Astros-appointed director would have fiduciary duties, *see, e.g.*, Mem. Opp. at 1, 20 & n.3.

Second, there are substantial grounds for difference of opinion. Comcast argues otherwise by focusing on an issue that is *not part of this appeal*: whether "individuals making decisions for a ... debtor-in-possession have no fiduciary duty to the estate." Comcast Br. at 7. But no one is arguing the Network can serve as the debtor-in-possession without being subject to any fiduciary duties. The Astros' appeal focuses on the antecedent issue whether a debtor or its affiliates in an involuntary bankruptcy can be forced to carry out fiduciary duties that they previously validly disclaimed rather than simply appointing a trustee. That issue is "difficult and of first impression," *North Fork Bank v. Abelson*, 207 B.R. 383, 390 (E.D.N.Y. 1997) (internal quotations & citation omitted), with a substantial body of precedent suggesting the bankruptcy court erred by imposing fiduciary duties on unwilling parties in an involuntary bankruptcy. The Rockets, for their part, simply repeat the error of the bankruptcy court by assuming cases reciting the general proposition that a debtor-in-possession generally has the responsibilities (and therefore the fiduciary duties) of a trustee resolves the issue. Rockets Br. at 8. As explained below, that assumption is wrong and conflicts with Supreme Court and Fifth Circuit precedent.

Third, this appeal will materially advance the termination of the litigation. Comcast disagrees because it believes that if it loses the fiduciary-duty issue it will still prevail on its backup arguments. But those are backup arguments precisely because the bankruptcy court already all but rejected them. *See* 2/4/2014 Tr. [Bankr. Dkt. 213] at 110:2-6, 170:7-13. In any event, Comcast cannot show the appeal will not materially advance the termination of the litigation by simply assuming it will win on appeal. The proper question is whether the appeal

will materially advance the termination of the litigation if the Astros prevail. Because the bankruptcy court already signaled that any reorganization is futile absent forcibly imposing fiduciary duties, it will. *See* Mem. Opp. at 1, 20, 20 n.3.

The Rockets do not dispute that if the Astros prevail on appeal it will materially advance the termination of *this litigation*. They instead focus on the different question whether a successful appeal would advance the termination of all litigation between all interested parties. *See* Rockets Br. at 8. That is not the test. *See In re Ichinose*, 946 F.2d 1169, 1177 (5th Cir. 1991) (asking whether an immediate appeal would "materially advance the ultimate termination of *the* litigation," meaning the case). It is therefore irrelevant whether a liquidation of the Network would be contentious or whether an adversary proceeding between the Astros, Comcast, and the Astros' previous owners would continue in state court after the bankruptcy is dismissed. A successful appeal by the Astros would require dismissal of the involuntary petition, which would bring *this bankruptcy case* to a close.

II. NONE OF THE ARGUMENTS BY COMCAST OR THE ROCKETS ESTABLISH A REASONABLE LIKELIHOOD OF REHABILITATION EXISTS

A. Comcast And The Rockets Avoid Addressing Preemption, Even Though The Network, Its General Partner, And The Astros-Appointed Director Do Not Owe Fiduciary Duties Unless Valid State-Law Disclaimers Are Preempted

Common ground exists on what would resolve the disputed fiduciary-duty issue in this case. Comcast and the Rockets do not dispute that the Network's LP Agreement expressly disclaims the fiduciary duties of the General Partner and its directors and that Delaware law recognizes those disclaimers. *See* 6 Del. Code § 17-1101; LP Agreement (JX 3) § 13.2. They similarly do not dispute the preemption principles outlined in the Astros' brief. As the Astros explained, state laws such as 6 Del. Code § 17-1101 continue to apply in bankruptcy unless preempted. *See Butner v. United States*, 440 U.S. 48, 49, 55 (1979). Preemption, in bankruptcy

no less than any other area of law, is heavily disfavored and starts from the presumption that Congress did not intend to supplant state law "unless that was *the clear and manifest purpose* of Congress." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (internal quotations & citation omitted); *see In re Davis*, 170 F.3d 475, 482 (5th Cir. 1999) (en banc).

Applying these undisputed principles leads to a straightforward answer in this case: The bankruptcy court had no authority to override Delaware law and impose fiduciary duties that the Network and its affiliates validly disclaimed. Nothing in the Bankruptcy Code indicates a clear and manifest purpose to preempt 6 Del. Code § 17-1101 and similar state laws. Indeed, no express preemption exists, a point Comcast conceded below. *See* 2/4 Tr. at 106:8-15. And State disclaimer laws also do not frustrate the "purposes and objectives of Congress," *Simmons v. Sabine River Authority Louisiana*, 732 F.3d 469, 473-74 (5th Cir. 2013) (internal quotations & citation omitted), because the power in all cases to appoint a trustee to administer the estate ensures a fiduciary is always available to administer the estate, *see* 11 U.S.C. § 1104(a).

Appointing a trustee when the debtor-in-possession and its affiliates have validly disclaimed fiduciary duties is not contrary to "the regime Congress intended," Comcast Br. at 15. Congress authorized debtors-in-possession to serve in the place of trustees "to obviate the need to appoint a trustee ... even though [the debtor] appeared capable of carrying on the business during" bankruptcy and of "carry[ing] out the fiduciary responsibilities of a trustee." *Wolf v. Weinstein*, 372 U.S. 633, 649, 651 (1963). But no court has ever held Congress intended a regime that forced debtors and affiliates to serve as fiduciaries against their will. *See id.* at 651 (holding that if a debtor-in-possession declines to carry out "the fiduciary responsibilities of a trustee," then "the court may at any time replace them with an appointed trustee."); *In re Herberman*, 122 B.R. 273, 284 (Bankr. W.D. Tex. 1990) (noting an "involuntary debtor would

rightfully argue that one cannot be compelled to serve in a fiduciary capacity against one's will).[2]

Comcast and the Rockets do little to dispute this straightforward preemption analysis and instead primarily repeat the bankruptcy court's mistake by reciting the general proposition that a debtor-in-possession generally has the responsibilities (and therefore the fiduciary duties) of a trustee, and assuming that cases saying as much resolve the issue in this case. *See* Comcast Br. at 11-12, 17-18; Rockets Br. at 16-18. *In re Hampton Hotel Investors, L.P.*, 270 B.R. 346, 361-62 (Bankr. S.D.N.Y. 2001), a case which Comcast cites does the same thing, treating the statement of that general proposition in *Wolf v. Weinstein*, 372 U.S. 633 (1963), and *CFTC v. Weintraub*, 471 U.S. 343 (1985), plus the general principle that corporate directors in bankruptcy represent creditors, not shareholders, as conclusive proof that the Code trumps state fiduciary-duty law. However, as the Astros already explained in its opening brief, *Wolf*, *Weintraub*, and all the other cases stating the general proposition do not resolve whether the Bankruptcy Code preempts state-law fiduciary-duty disclaimers because none of those cases involved disclaimed fiduciary duties. Decisions do not silently resolve issues that were "neither noted nor discussed." *Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011).[3]

The Rockets attempt to add a perfunctory preemption analysis to its case cites, but that

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[2] The Rockets repeatedly, but mistakenly, state that the Astros are arguing the Network can serve as the "debtor in possession under federal bankruptcy protection without being subject to any fiduciary duties." Rockets Br. at 16. Not so. The Astros position is that a bankruptcy court cannot force a debtor-in-possession to accept validly disclaimed fiduciary duties, but instead only has the power to appoint a trustee if appropriate.

[3] *In re Hampton* is also distinguishable because it involved a voluntary petition, not an involuntary one. The bankruptcy court in that case thus did not have to consider the coercion involved in forcing a debtor or its affiliates to fulfill fiduciary duties they disclaimed and did not want in a bankruptcy they did not choose to file. *See In re Herberman*, 122 B.R. at 284. That result makes involuntary bankruptcy, an already "severe remedy," even more severe. *In re Green Hills Dev. Co.*, 2014 WL 380386, at *2 (5th Cir. Feb. 3, 2014). Moreover, despite its logical flaws, the outcome in *In re Hampton* is identical to the outcome under the Astros' analysis—the bankruptcy court removed the debtor-in-possession and appointed a trustee. *See In re Hampton*, 270 B.R. at 348-49, 360 n.32.

analysis is unpersuasive. Congress, according to the Rockets, preempted 6 Del. Code § 17-1101 and other state fiduciary-disclaimer laws in 28 U.S.C. § 1334. Because that statute gives district courts "original and exclusive" jurisdiction over bankruptcy cases and exclusive jurisdiction over '"all of the property ... of the debtor ... and of property of the estate,'" the Rockets reason, federal law must "preempt state law." Rockets Br. at 19 (quoting 28 U.S.C. § 1334(e)(1)). Yet, the Rockets offer no explanation why fiduciary-disclaimer laws conflict with that jurisdictional statute, and there is none. Section 17-1101 does not claim to deprive federal courts of original and exclusive jurisdiction over bankruptcy cases. And even if there were a conflict, there is also a remedy—the appointment of a trustee.

Preempting state fiduciary-disclaimer laws also is not necessary to protect the "basic constitutional mandate" to have "a uniform system of bankruptcy laws." *Id.* at 19 n.9. Rather, the "property rights in the assets of a bankrupt's estate" are generally left "to state law." *Butner*, 440 U.S. at 54. Yet the Bankruptcy Code survives.

Comcast takes a different tack and argues there is potentially no need for preemption at all.[4] The Network's LP Agreement, according to Comcast, only "disclaimed any fiduciary duty to one another under Delaware law," so there is no need to preempt Delaware law to impose federal fiduciary obligations. Comcast Br. at 13 (emphasis deleted). But nothing in the LP Agreement limits the disclaimer to Delaware law. It disclaims "*any* fiduciary duty." LP Agreement § 13.2. The Astros are aware of no cases where a debtor had validly disclaimed fiduciary duties, but nonetheless was forced to assume such duties as a debtor-in-possession in bankruptcy. Again, federal obligations are imposed on a *trustee*—only if the debtor is capable of fulfilling a trustee's duties can a trustee be avoided. Here, given the valid disclaimers, the

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[4] Comcast, like the bankruptcy court, conflates the Astros' futility and bad-faith arguments. *See* Comcast Br. at 9. Whether reorganization is futile under § 1112(b) is distinct from bad faith.

Network cannot stand in the shoes of a trustee. To argue that it can, because federal law imposes fiduciary duties, has the analysis exactly backwards.

Moreover, Comcast cannot avoid preemption by arguing the state-law duties remain unchanged and that new federal duties are simply added on top. *See* Comcast Br. at 16-17. Stating the state-law disclaimers remain in place, additional federal obligations simply render them ineffective throughout the bankruptcy, is just preemption by another name. Moreover, the argument proves too much because it would apply equally to any question in bankruptcy about the control and distribution of property. Indeed, it would have applied to the security interests at issue in *Butner*: The Supreme Court could have said that whether a mortgagee has a secured interest in rents generated by a property under state law remained the same, the bankruptcy filing simply created a new federally conferred security interest on top. *See Butner*, 440 U.S. at 52-53. It did not. *Id.* at 51-54.

B. Fiduciary Duties Would Fundamentally Transform The Network And Result In Termination

The arguments advanced by Comcast and the Rockets for why, even if a bankruptcy court could forcibly impose fiduciary duties, the forced imposition of those duties would not trigger the Astros' termination rights under 11 U.S.C. § 365(e)(2) are equally unpersuasive. As the Astros' explained in its opening brief, the ability of the Astros-appointed director to exercise his consent rights solely for the benefit of the team is central to the Network's governance. The entire purpose of imposing previously disclaimed fiduciary duties is to significantly change the Network's corporate governance from what the parties agreed to when they entered into the Media Rights Agreement (JX 10). Mem. Op. at 20, 23. The bankruptcy court wanted the Astros-appointed director to sacrifice the value or integrity of the Astros' media rights if necessary to maximize creditor recoveries. The Astros never contemplated—and never would

have agreed to—assigning their media rights *for the next twenty years* to a Network in which the team's voice in key governance issues is eviscerated.

That change in the Network's "business practices or policies ... alter[s] the parties' bargain in a[] significant way." *Star Cellular Tel. Co. v. Baton Rouge CGSA, Inc.*, 19 Del. J. Corp. L. 875, 892 (Del. Ch. 1993), *aff'd*, 647 A.2d 382 (Del. 1994). The Astros contracted with a Network where their interests would be protected by a director who possessed consent rights and a mandate to exclusively represent the interest of the team. And coercively imposing fiduciary duties that change that key assumption underlying the Media Rights Agreement "creates [an] unreasonable risk" that its highly personal media rights could be used in a way that undermines its long-term interests. *Id.* at 890. By significantly altering how the Network would perform its obligations under the Media Rights Agreement in a way that threatens the Astros' interests, the coercive imposition of fiduciary duties amounts to an impermissible assignment of the Astros' media rights. *See id.* ; *Tenneco Auto Inc. v. El Paso Corp.*, 2002 WL 453930 (Del. Ch. Mar. 20, 2002); *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 2011 WL 1348438, at *12 (Del. Ch. Apr. 8, 2011).

Comcast tries to recast this principle of Delaware law first announced in *Star Cellular* into a mere "statement" with no legal significance. Comcast Br. at 21. Delaware cases since *Star Cellular* have recognized and applied the rule announced in *Star Cellular*, so that argument has no merit. *See, e.g.*, *Tenneco*, 2002 WL 453930, at *3 ("engag[ing] in the analysis employed by this Court in *Star Cellular*"); *Meso Scale Diagnostics*, 2011 WL 1348438, at *12-13 (similar)[5]. The Rockets do not dispute that Delaware courts recognize this principle. It instead

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[5] Comcast's other argument, that the imposition of fiduciary duties is not a fundamental change because the Astros understood the LP Agreement only disclaimed state-law fiduciary duties and other fiduciary duties might exist is made up from whole cloth. *See* Comcast Br. at 13, 17, 22-

argues the principle should not apply here because attempts to invoke it by other litigants under different facts have proven unsuccessful. *See* Rockets Br. at 29-30. That litigants have unsuccessfully invoked a rule of law in one circumstance does not mean the principle is inapplicable in all circumstances. And the facts in those other cases are distinguishable. *See Baxter Pharm. Prods, Inc. v. ESI Lederle Inc.*, 1999 WL 160148, at *5 (Del. Ch. 1999) (finding stock sale did not violate anti-assignment provision because, after stock purchase, the company "maintain[ed] the same corporate policies" and executives); *Star Cellular*, 19 Del. J. Corp. L. at 892 (finding no change in corporate policies after stock purchase).

Institut Pasteur v. Cambridge Biotech Corp., 104 F.3d 489 (1st Cir. 1997), another case cited by the Rockets, does not "reject" the Astros' argument. Rockets Br. at 29. That case did not announce a broad principle that changes in control, no matter how significantly those changes alter the corporate governance structure, never violate an anti-assignment provision. It merely held that under Massachusetts—not Delaware—law and the terms of the relevant agreement, a change in control via a stock sale did not amount to an impermissible assignment. *Institut Pastuer*, 104 F.3d at 494 ("Pasteur's contention finds no support, however, either in Massachusetts law ... or in the cross-license provisions it negotiated."). The terms of the cross-license provisions in *Pasteur* demonstrated "that Pasteur foresaw, or reasonably should have foreseen, that [the debtor] might undergo changes of stock ownership which would not alter its corporate legal identity." *Id.* at 495. The Astros could not possibly have foreseen that a court would forcibly impose fiduciary duties on its appointed director that the Network's governing documents validly disclaimed.

Faithfully applying Delaware law here will not, as the Rockets claim, "trigger special

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23. There is no evidence the Astros had that understanding, and the LP agreement says it disclaims "*any* fiduciary duty." LP Agreement § 13.2.

section 365 protection rights ... in every case." Rockets Br. at 28-29. That claim starts from the false premise that bankruptcy "*always* imposes new duties on the managers of a debtor." *Id.* at 29 (emphasis in original). In fact, bankruptcy typically does not impose new fiduciary duties, but instead changes to whom the managers owe those duties from the shareholders to the creditors. *In re Performance Nutrition, Inc.*, 239 B.R. 93, 111 (Bankr. N.D. Tex. 1999). More importantly, the managers of most debtors have not validly disclaimed all fiduciary duties—that is not even an option for corporate managers and directors—and it is even rarer still that the disclaimer of those fiduciary duties is a material background assumption for an agreement with a third party. The imposition of fiduciary duties here is an impermissible *de facto* assignment here, in other words, for a highly factbound and likely unique reason: The Astros believed they could protect their media rights through their duty-free director when they entered into the Media Rights Agreement. The cases cited by the Rockets where courts have held that trustees and debtors-in-possession may assume contracts without triggering termination rights, *see* Rockets Br. at 30-31, simply did not involve imposing disclaimed fiduciary responsibilities or any other analogous circumstance.

The Rockets' final argument—that the Astros waived the right to argue the forced imposition of fiduciary duties would trigger the team's termination rights under 11 U.S.C. § 365(e)(2)—also fails. The Astros did not raise this argument below because no one raised the fiduciary-duty theory below and the issue was never briefed. The bankruptcy court crafted the theory on its own and shared its novel theory with the parties on the same day it granted the involuntary petition and denied the Astros' motion to dismiss. There is no basis in law or logic for a rule that would penalize the Astros for not briefing an issue the district court granted and adopted without any notice to the parties or an opportunity to brief the issue.

C. The Bankruptcy Court Recognized Reorganization Is Futile Absent Fiduciary Duties

Comcast and the Rockets attempt to downplay the significance of the fiduciary-duty issue by arguing a successful reorganization is possible even absent forcibly imposed fiduciary duties. The bankruptcy court disagreed, and rightly so. *See* Mem. Op. at 1 ("Because the futility argument is based on a theory that a director appointed by the Astros has no fiduciary duty to the Estate, the futility argument also fails."); *id.* at 20 ("[W]hen the four directors act in unison to implement their fiduciary responsibilities, [the] history [of unprofitable business plans] is unlikely to be repeated."); *id.* at 20 n.3 ("If [fiduciary duties] exist, the case is not futile.").

1. Comcast's Reorganization Proposals All Lead To Termination Of The Media Rights Agreement

The paths to reorganization presented by Comcast since it filed the involuntary petition are destined to fail. Comcast first sought the appointment of a trustee to oversee an auction of the Network and its assets, preferably to a Comcast-controlled entity. *See* Bankr. Dkt. 3 ¶¶ 7, 41. It relabeled its request as one for "an examiner with expanded powers"—including the power to conduct an auction—while seeking the same ultimate result. *See* Bankr. Dkt. 188 ¶¶ 11, 18. Regardless of the label, the bankruptcy court properly recognized that the appointment of an outsider to take control of the Network and auction its assets would trigger the Astros' right to terminate the Media Rights Agreement. *See* 2/4 Tr. at 110:2-6, 170:7-13.

Despite having withdrawn its motions for the appointments of a trustee or an examiner, Comcast (joined by the Rockets) nonetheless presses three arguments for why a trustee or examiner could assume the Media Rights Agreement without triggering the Astros' termination rights. *See* 11 U.S.C. § 365(e)(2). None are persuasive.

First, Comcast argues the Media Rights Agreement falls outside the protections of § 365(e)(2) because it is neither a trademark license nor a personal services contract. *See*

Comcast Br. at 26-29. That is simply not true, and Comcast's arguments are so weak that the Rockets decline to echo them. The normal rule that "trademark licenses cannot be assigned without the consent of the licensed party" does not apply here, according to Comcast, because the Media Rights Agreement merely "contains an incidental trademark license allowing the Network to use the Astros' team logo when telecasting their baseball games." *Id.* at 28. Trademark law does not have an incidental-purpose exception. "[T]he universal rule is that trademark licenses are not assignable in the absence of a clause expressly authorizing assignment." *In re XMH Corp.*, 647 F.3d 690, 695 (7th Cir. 2011). Nor do 11 U.S.C. §§ 365(c)(1) and (e)(2) authorize courts to decide on a case-by-case basis whether the interest served by the "applicable law" barring assignment are central enough to honor. If the applicable law bars assignment, that is the end of the inquiry. The three cases cited by Comcast to support its novel rule—*In re Sunrise Restaurant, Inc.*, 135 B.R. 149 (Bankr. M.D. Fla. 1991), *In re Tom Stimus Chrysler-Plymouth, Inc.*, 134 B.R. 676 (Bankr. M.D. Fla. 1991), and *In re Feyline Presents, Inc.*, 81 B.R. 623 (Bankr. D. Colo. 1988)—do not mention trademark law or an incidental-purpose exception to §§ 365(c)(1) and (e)(2).

Comcast's backup argument that "the policy behind" the non-assignability does not apply here because the Media Rights Agreement "provides specific guidelines for using the Astros' trademarks" makes no sense and is entirely unsupported by law. Comcast Br. at 29. Indeed, as explained in the Astros' opening brief, such an exception would swallow the rule. Because a trademark owner has a duty "to exercise control and supervision over the licensee's use of the mark," *Sheila's Shine Products, Inc. v. Sheila Shine, Inc.*, 486 F.2d 114, 123-24 (5th Cir. 1973), most trademark licenses include usage guidelines.

The notion that the Media Rights Agreement is not a personal services contract is equally

misplaced. According to Comcast, the Network's role does not require the special "character, reputation, taste, skill, or discretion" indicative of a personal services contract. *In re Lil' Things, Inc.*, 220 B.R. 583, 590 (Bankr. N.D. Tex. 1998). Its role, in Comcast's view, "could be performed by virtually any local telecaster." Comcast Br. at 27. That attorney argument cannot substitute for the testimony that the Astros view their partnership with the Network as "the single most important relationship that [the team] has in its local market" because the Network is its "alter ego" in the community. 10/28/2013 Tr. [Bankr. Dkt. 140] at 167:6-13. The Network also has access to the team in the locker room, on its private plane, and at the team hotel throughout the 162-game season that no one else has. The degree of "confidence[] and trust" that type of access requires is not the kind the Astros would indiscriminately give to any local telecaster. *In re Martin*, 117 B.R. 243, 249 (Bankr. N.D. Tex. 1990); *see* 10/28 Tr. at 167:22-168:12.

It is irrelevant that the Astros could and would find another broadcast partner if the Media Rights Agreement is terminated. A personal services contract does not have to be for an irreplaceable service. It merely needs to be one where the special nature of the services provided indicate a party, such as the Astros, would want a say in who provides the services. There is also no legal basis for the case-by-case inquiry Comcast implicitly requests into whether the beneficiary of a personal services contract can legitimately complain that the assignee is not an adequate substitute. *See* Comcast Br. at 27. The point of a personal services contract is that the beneficiary alone gets to decide whether a proposed assignee is adequate.

Second, Comcast and the Rockets argue that a trustee is *always* allowed to assume an executory contract—even one protected by §§ 365(c)(1) and (e)(2)—"provided it has no actual intent to assign the contract to a third party." Rockets Br. at 23 (internal quotations & citation omitted); *see* Comcast Br. at 25-26 & n.11. The Fifth Circuit disagrees. In *In re O'Connor*, 258

F.3d 392 (5th Cir. 2001), for example, there was no evidence that the trustee intended to assign the debtor's partnership agreement to a third party. The trustee intended to assume the agreement so that it could sue the debtor's partners. *Id.* at 394, 402. Yet the Fifth Circuit held "the [partnership] agreement was *not* assumable under § 365(c)(1)." *Id.* at 402 (emphasis in original). That is because the proper test for assumption or assignment is whether it would "in fact" force a nondebtor party to an agreement protected by 11 U.S.C. §§ 365(c)(1) and (e)(2) "to accept performance from or render performance to a party—*including the trustee*—other than the party with whom it originally contracted." *In re Mirant Corp.*, 440 F.3d 238, 248 (5th Cir. 2006). That would happen here every time the trustee-controlled Network broadcast a game, traded on the Astros' good will during other broadcasts, entered the team locker room, or boarded the team's plane. *See Weintraub*, 471 U.S. at 352-53 ("Congress contemplated that when a trustee is appointed, he assumes control of the business, and the debtor's directors are 'completely ousted' [and] retain virtually no management powers.").

Third, Comcast and the Rockets argue that the Astros "expressly consent[ed] to assignment of the media rights agreement" in Section 13.8(A) of the Media Rights Agreement. Comcast Br. at 24; *see* Rockets Br. at 24. Not so. Section 13.8(A) allows the Network to assign the Media Rights Agreement "to a purchaser of all or substantially all of the assets of the Network" without the Astros' consent. Media Rights Agreement § 13.8(A). But the appointment of a trustee is not a purchase of the Network's assets. In addition, Section 12.5(C) of the Media Rights Agreement gives the Astros the unilateral right to terminate the agreement if the Network files for bankruptcy, if it "makes an assignment for the benefit of its creditors," or if a "trustee is appointed for [the] Network." *Id.* § 12.5(C). It would make no sense to interpret the Media Rights Agreement to waive in Section 13.8(A) the protections expressly provided in

Section 12.5(C).[6]

Neither Comcast nor the Rockets attempt to deal with Section 12.5(C) in their briefs. The Rockets ignore it entirely. Comcast attempts to dismiss it as an unenforceable *ipso facto* clause under 11 U.S.C. § 365(e)(1). *See* Comcast Br. at 20 n.8. That argument overlooks that the Media Rights Agreement is not assignable under federal trademark law or Delaware contract law governing personal services contracts. *See In re XMH Corp.*, 647 F.3d at 695; *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *11 (Del. Ch. Jan 29, 2010). Section 365(e)(2) overrides § 365(e)(1) and makes *ipso facto* clauses enforceable where "applicable law"—such as federal and Delaware law here—"excuses a party, other than the debtor, to such a contract or lease from accepting performance from or rendering performance *to the trustee* or to an assignee." 11 U.S.C. § 365(e)(2)(A)(i). Section 12.5(C) of the Media Rights Agreement is enforceable and gives the Astros the right to terminate the Media Rights Agreement if a trustee is appointed.

Finally, the four cases cited by Comcast to support its waiver argument are easily distinguishable. In two of those cases, a court found a party had waived its rights under 11 U.S.C. §§ 365(c)(1) and (e)(2) where contractual "language clearly contemplate[d] assignment in bankruptcy." *In re Midway Airlines, Inc.*, 6 F.3d 492, 497 (7th Cir. 1993); *see In re Supernatural Foods, LLC*, 268 B.R. 759, 804 (Bankr. M.D. La. 2001) (holding a party waived its § 365(c) rights where the agreement "by its very terms carve[d] out an exception to [its] general rule" prohibiting assignments "by allowing assignment incident to a liquidation of all or substantially all of [the licensor's] assets"). The third case involved an agreement that expressly

[6] The Rockets also cite Section 15.6 of the LP agreement. *See* Rockets Br. at 25-26. But a contractual provision that does not apply for another six years cannot possible prove that the Astros consented to the assignment of their media rights in bankruptcy today.

"authorize[d] assignment under limited circumstances," *In re Quantegy*, 326 B.R. 467, 471 (Bankr. M.D. Ala. 2005), and the final merely noted waiver is possible without addressing whether it actually occurred, *In re ANC Rental Corp.*, 277 B.R. 226, 237 n.9 (Bankr. D. Del. 2002). The Media Rights Agreement, in contrast, clearly contemplates that the appointment of a trustee or an assignment in bankruptcy cannot occur without the Astros' consent.

2. The Astros' Director Will Not Automatically Veto Any Plan, But No Viable Reorganization Option Exist

Both Comcast and the Rockets, in a transparent attempt to recast the Astros' as the bad-faith actors in this case, repeatedly claim that "the Astros will instruct their Director to reject any plan of reorganization that could possibly be proposed by the Network out of hand." Rockets Br. at 15; *see id.* at 2, 16; Comcast Br. at 10. That misrepresents the Astros' position, which has been to support proposals that would lead to a profitable Network while preserving the Astros' consent and governance rights.

Such plans simply do not exist. None were proposed to the partners before the Involuntary Petition was filed. As the bankruptcy court found, Comcast "w[as] presenting rotten business deals" to the Astros. 2/4 Tr. at 79:2-9. The best proposal Comcast presented would have resulted in the Network losing more than $200 million over ten years. *See* 10/28 Tr. at 333:10-25, 400:12-14; JX 14. Nor were there any profitable proposals when the Astros and then the Rockets took turns as lead negotiators for the Network for more than three months beginning October 29, 2013. All of the proposals would have resulted in an unprofitable Network and would have wiped out the Astros' equity interest or forced the Astros to contribute additional capital that reduced the economic value of its media rights fees—a reality that Comcast and the Rockets do not dispute in their briefs.

The Rockets also claim any assessment of futility is premature at this point because

someone may come up with a profitable plan as the case progresses. *See* Rockets Br. at 21-22, 32. But once again, there is no evidence that a profitable path forward exists. A fervent wish that a profitable plan exists cannot overcome two years' of evidence that it does not.

Mr. Crane's testimony does not contradict the extensive evidence that no profitable plan exists. He offered his belief that the Network could be profitable if properly managed *before* the Astros and Rockets unsuccessfully attempted for more than three months to identify a profitable path forward. Mr. Crane also provided his testimony in response to a hypothetical from the bankruptcy court that assumed a reorganized Network with no liabilities and with the consent rights of the Astros, the Rockets, and Comcast jettisoned. *See* 10/28 Tr. at 146:8-158:11. That hypothetical scenario is not a realistic possibility. Eliminating the consent rights would require modifying the *General Partner's operating agreement*, not the partnership agreement for the Network. But the bankruptcy court has no authority to rewrite an agreement between third-party non-debtors, *see, e.g.*, *In re Adelphia Comm'ns Corp.*, 2004 WL 2186582, at *12 (S.D.N.Y. Sept. 27, 2004), and the Astros-appointed director would not consent to eliminating those rights.

Comcast's proposal to serve as a stalking-horse bidder for the Network and its assets in an auction is also not evidence that a reasonable likelihood of a successful reorganization exists. *See* Rockets Br. at 33 & n.18. The sale of the Media Rights Agreement to the highest bidder would trigger the Astros' right to terminate that agreement. *See* 11 U.S.C. §§ 365(c)(1), (e)(2). Any buyer would thus purchase a Network without the media rights "critical to [a] successful reorganization." Bankr. Dkt. 94 at 21; *see* Rockets Br. at 10 (calling the Media Rights Agreement one of the Network's two "most valuable assets"). Without that critical asset, it is unlikely the Network could survive long post-confirmation, making any plan that depends on an asset sale over the Astros' objection unconfirmable. *See* 11 U.S.C. § 1129(a)(11) (precluding

confirmation of a plan if it is "likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan …"). It is regrettable that no profitable path forward exists, but there is no point moving forward with a bankruptcy that ignores that reality. *See id.* § 1112(b)(4)(A).

III. NONE OF THE ARGUMENTS BY COMCAST OR THE ROCKETS DISPEL COMCAST'S INCURABLE BAD FAITH

A. The Involuntary Petition Was Filed In Bad Faith

Comcast does not quibble with two critical facts—facts which, in the context of this case, establish bad faith warranting dismissal. First, Comcast does not dispute that Comcast Owner colluded with four Comcast affiliates to file the involuntary petition against the Network. Comcast Br. at 31; *see* 2/4 Tr. at 168:3-7. Nor does Comcast actually contest that its conduct circumvented the partnership agreement's prohibition on a voluntary bankruptcy filing of the Network without the unanimous consent of all partners. Comcast Br. at 32. Comcast instead contends that these two facts do not compel a finding of bad faith because the involuntary petition was filed to "prevent[] … a failure [of the Network] that would have led to the loss of many jobs and substantial other value." *Id.* at 31; *see id.* at 32 (arguing that "even if there were circumvention, it would not constitute bad faith given the filing's legitimate reorganizational objective"). Comcast, and the bankruptcy court, err in drawing that conclusion.

This is not a bankruptcy filing done to enhance the recoveries of unsecured creditors or to preserve jobs that will otherwise be lost. Indeed, the Network's primary creditors are its partners: Comcast, as a secured lender with a $100 million loan to the Network; and the Astros and Rockets, with substantial media rights fees due in the coming years. The Network has few other creditors, and their claims are being paid by the Network in the ordinary course. Indeed, Comcast points to no evidence—because there is none—that most of the Network's third-party

creditors would be harmed but for the bankruptcy of the Network. Nor is there any evidence that the bankruptcy filing prevented "the loss of many jobs," as Comcast now claims. Comcast Br. at 31. To the contrary, even if the current Network partnership is dissolved, the Astros' and Rockets' games will still be televised by some to-be-constituted network—one that likely includes Comcast given its dominant penetration in the critical Houston viewing area.

Comcast in truth colluded to file the involuntary petition—and make an end run around the contractual prohibition on a voluntary filing without unanimous consent—to gain a tactical advantage in a business dispute with the Astros. After nearly 18 months, the partners had not agreed on the Network's entry into any additional affiliation agreements beyond the Comcast Affiliation Agreement—because, as the bankruptcy court found, none of the identified affiliation agreements would have resulted in a profitable Network. Mem. Op. at 18. The Network therefore lacked sufficient revenue to cover its expenses. By September 2013, the Astros were on the cusp of the contractual right to terminate the Media Rights Agreement with the Network—a step which would have enabled the Astros to pursue another media rights deal to televise the team's games. *See* JX 21; JX 27; Media Rights Agreement § 12.3(D). And because of the side letter between the Astros and Rockets, the Rockets were assured of receiving approximately 45% of the total media rights payments to the teams under any new deal. JX 1. That result, however, would have left Comcast unable to recover on its $100 million secured loan—an unpalatable result for Comcast. *See* Mem. Op. at 15. Unable to identify a business solution to the partners' inability to agree on additional affiliation agreements for the Network, Comcast instead directed its four affiliates to file the involuntary petition on September 27. The "only reason that the Involuntary Petitions were filed on September 27th," as Comcast's witnesses concede, "was to prevent the Astros from terminating its Media Rights Agreement

with the Network"—ensuring that Comcast would be paid back on its loan. 10/28 Tr. at 326:17-21, 435:14-25. In short, Comcast prevented the Astros from exercising the contractual right to which the partners originally agreed. That is the epitome of a bad faith filing.

Comcast continues to place great weight on *In re Kingston Square Associates*, 214 B.R. 713 (Bankr. S.D.N.Y. 1997), but the differences between *Kingston Square* and this case are numerous. *First*, in *Kingston Square*, the involuntary petitions were necessary and appropriate in the face of a director that was unaware of his fiduciary duty to creditors and therefore unable to "carry out his fiduciary role." *Id.* at 716. Here, in contrast, the partners expressly disclaimed fiduciary duties to the Network and to each other, making clear that each partner is entitled to act in its own self-interest—and the involuntary petition was done precisely to circumvent the Astros' contractual right to veto a bankruptcy filing. *Second*, *Kingston Square* involves involuntary petitions filed by third-party creditors who would be harmed but for the bankruptcy filing. Not so here. Comcast—the very entity contractually prohibited from filing a voluntary bankruptcy without the partners' unanimous consent—colluded to have its affiliates file the involuntary petition. Indeed, unlike *Kingston Square*, the primary creditors who would be harmed here are the partners who agreed on the unanimous consent provisions. *Finally*, the bankruptcy court in *Kingston Square* assumed, without deciding, that "there is a[] possibility of reorganization." *Id.* at 714. As set forth above, however, there is no such possibility in this case.

The present facts are similar to those in *In re Global Ship, Systems, LLC*, 391 B.R. 193 (Bankr. S.D. Ga. 2007), and Comcast's attempt to distinguish that case is unavailing. The totality of Comcast's argument is that *Global Ship* found bad faith because of "a showing that the petition was not filed to achieve a legitimate reorganizational purpose." Comcast Br. at 34. *Global Ship* does not make such a finding. And in any event, the involuntary petition here was

filed to gain leverage in a dispute with the Astros—not for a legitimate reorganizational purpose.

B. The Joinders Do Not Cure Comcast's Bad Faith

Comcast and the Rockets contend that the subsequent joinders by the Rockets and the Network's landlord cure any bad faith in the original filing. Comcast first argues that the Astros' position, and the numerous cases in support, "are inconsistent with the plain text of the Bankruptcy Code," Comcast Br. at 35—but Comcast's position turns settled bankruptcy law on its head. To accept Comcast's interpretation of Section 303(c) would be permit bad-faith actors to file first and find appropriate petitioners later. That is a perverse result, especially because an "involuntary bankruptcy is a particularly severe remedy." *See In re Green Hills Dev.*, 2014 WL 380386, at *2. As numerous courts have held, "bad faith filings of involuntary petitions are not to be permitted" because "the policy of discouraging bad faith filings is paramount." *In re Centennial Ins. Assocs., Inc.*, 119 B.R. 543, 546-47 (Bankr. W.D. Mich. 1990); *see* Feb. 24, 2014 Astros' Brief of Appellants [Dkt. 39] at 44-45 (citing cases).

Comcast's next argument—that "there is nothing to be gained and much to be lost by" dismissing a bad faith bankruptcy filing if good faith petitioners could immediately file a new petition, Comcast Br. at 37—has similarly been rejected. As the bankruptcy court held in *In re Centennial*, the "supposition that the three remaining creditors may turn around and refile the case is largely irrelevant. If that occurs, their petition will be judged on its merits." 119 B.R. at 547. So too here: if the involuntary petition is dismissed and three good faith actors subsequently file a new petition, it will be judged on its merits. In the interim, however, the Astros will have the opportunity to exercise their contractual rights.

CONCLUSION

For the foregoing reasons, this Court should reverse the appealed orders.

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